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No. 146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ZEOLA MARTIN RIMBOW, SELENA J. THOMAS & L. F. HUCKABY, DOING BUSINESS IN THE FIRM NAME OF HUCKABY FUNERAL SERVICE, *Petitioners.*

v.

ROSE ESTHER RIMBOW, JESSE RIMBOW JR., BESSIE MAE RIMBOW, MINORS, ACTING BY THEIR GUARDIAN AD LITEM, HENRY E. KAHN, HENRY L. THOMPSON AND A. B. GERLAND, *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Rose Esther Rimbow,

HENRY E. KAHN,
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Bessie Mae Rimbow and
Jesse Rimbow Jr.

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YOUNG CO., HOUSTON

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Respondents, Rose Esther Rimbow, Jesse Rimbow Jr. and Bessie Mae Rimbow, minors, in opposition to the petition for writ of certiorari in the above cause, respectfully submit to the Court:

The Application for Certiorari presents no Federal

question. It is well settled that the Laws of the Courts of last resort in the State in which the case is decided are binding on the Supreme Court. *Claxson Company v. Stentor Electric Manufacturing Company,* 313 U. S. 487-498; *J. Rob Griffin, Admr. v. McCoach,* 313 U. S. 498. The cause was tried under and by virtue of what is called Rule 329, which was promulgated by the Supreme Court and adopted and made the law by the legislature of the State of Texas; Rule 329 is the same as Article 2236 of the Revised Statutes of the State of Texas, which Rule and which Statute provide that in a case where defendant is cited by publication and the defendant does not make his appearance in court, that the defendant has two years in which to file a bill of review which was done in this case.

Therefore, all matters having been adjudicated by the Court of Civil Appeals and the Supreme Court of Texas, there is no assignment that can be considered by the United States Supreme Court and a writ of certiorari should, in all things, be refused. However, should the Court differ, we present the following:

STATEMENT.

Respondent, Rose Esther Rimbow's trial pleading was her second amended motion for new trial. (R. 3.) The following is a brief statement of the motion:

That on February 11th, 1944, Jesse Rimbow Sr., now deceased, filed suit for divorce against her in the 127th District Court of Harris County, Texas, and

on the 30th day of March, 1944, was awarded decree dissolving their bonds of matrimony; that said divorce judgment was void for the reason that service of process in said suit was had by publication solely on the following unsworn statement of Jesse Rimbow Sr., deceased, to-wit:

"Jesse Rimbow, plaintiff in the above entitled and numbered cause being duly sworn, says that the defendant's residence is unknown to affiant, and that he, the plaintiff, has made diligent effort to locate the defendant, but has been unsuccessful.

"Wherefore plaintiff prays the citation be issued by publication.

"(Signed) Jesse Rimbow.

"THE STATE OF TEXAS }
"COUNTY OF HARRIS }

"Before me, the undersigned authority, on this day personally appeared Jesse Rimbow, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

"Given under my hand and seal of office this 9th day of February, 1944, A. D.

"(Signed) HENRY L. THOMPSON

(SEAL) "Notary Public in and for Harris County, Texas." (R. 4-5.)

That all of the evidence of the said Jesse Rimbow Sr. upon which the judgment dissolving their bonds of matrimony was rendered, was totally false and taken verbatim from the Statement of Facts on file in said cause, is as follows:

"They remained wholly separated and apart by virtue of mistreatment of plaintiff by defendant; that the defendant commenced a course of unkind, harsh and tyrannical treatment which continued with very slight intermission until the separation took place, which was on or about the the 28th of December, 1943; that the defendant nagged plaintiff continuously which resulted in loss of his peace of mind; that defendant left him and abandoned him on or about December 28th, 1943, while they were in Houston, Texas, and that he has not seen nor heard from the defendant yet, and also that he has made diligent effort on many occasions to try to locate defendant, but has been unsuccessful; that defendant was a person of violent passions and ungovernable temper; that he could no longer live with defendant, even though she had not abandoned him." (R. 5-6.)

That she and Jesse Rimbow were married in 1934, and lived together as husband and wife until December 28th, 1943, and that she had always done her part by him as his wife; that on December 25th, 1943, at their home at 4309 Lillie Street, in Houston, Texas, without fault on her part, he severely struck her in the back of her head with a chair and knocked her to the floor, and cut a deep gash in her head; that she was then frail and in ill health; that he was sorry for having struck her and on that evening arranged for her to take a trip to be with her sister, Gladys Mason, in Los Angeles, California, for a month or two to rest up and get well, and then come back home. That on December 28th, 1943, she went direct from Houston, Texas, to Los Angeles, and was there with her sister from then on until his death; that he had sent her

there, paying her fare, to stay until he would send her the money on which to come back, but that he never sent her the money to come home on. (R. 6-7.)

That said statement and purported affidavit by Jesse Rimbow, Sr., deceased, as the basis for said citation of service by publication, "that the defendant's residence was unknown to him" was absolutely false and known by him to be false at the time he made it, that it was made to avoid personal service of citation on her, and to keep her from knowing about the suit for divorce against her. The said purported false certificate that the residence of the defendant was unknown to him, was a fraud on the court and the jurisdiction thereof. That by making false certificate, he prevented her from knowing of said suit; that if she had been personally cited in the case, or known thereof in time, she would have filed an answer therein, and would have contested the suit, and would have defeated him therein. (R. 7-8.)

That on the 2nd day of April, 1944, Jesse Rimbow Sr., now deceased, married the defendant, Zeola Martin Rimbow, in Harris County, Texas. That for many years prior to and at the time she left for Los Angeles, she and Jesse Rimbow Sr. owned as their community property, their home at 4309 Lillie Street, in Houston, Texas, and lived in it, it being of the reasonable value of $2000.00, and was completely paid for before the death of the said Jesse Rimbow Sr., deceased. That for more than a week before the suit for divorce was filed, and continuously until Jesse Rimbow Sr. married Zeola Martin Rimbow, the said

Zeola Martin Rimbow lived in adultery with the said Jesse Rimbow Sr., in their said home at 4309 Lillie Street, in Houston, Texas, all of which was unknown to Rose Esther Rimbow, the appellee herein. That the said Zeola Martin Rimbow well knew at all times material that Jesse Rimbow Sr. was married to the appellee, Rose Esther Rimbow, and that she knew of said divorce against her at the time it was filed, and when the judgment was entered granting the divorce. (R. 8-9.)

Appellee was not present at the trial of the divorce suit on the 30th of March, 1944, and did not appear there by an attorney of her own selection, nor in any other manner, that she did not know of the case until the 13th of April, 1944, when Jesse Rimbow Sr. was already dead. That if she had known of the suit she would have successfully contested the case; that she had a good defense against the suit because the evidence given by Jesse Rimbow Sr. in support of his divorce suit was false and that he never had any grounds for divorce against her. That if she was cruel to him, he had condoned her cruelty. That she, however, denies that she was ever cruel to him. That from the time she left for California on December 28th, 1943, until after he filed suit against her on February 9th, 1944, they corresponded with each other, he writing her three letters over that period, and she writing him five letters over that period, and by letter of date the 28th of January, 1944, he stated to her that he would send her the money with which to return to him from California when he received his

back pay from his employer. That in the letters they were affectionate to each other. That Zeola Martin Rimbow lured Jesse Rimbow Sr. away from appellee, Rose Esther Rimbow. (R. 9-12.)

That on the 9th day of April, 1944, Jesse Rimbow Sr. was injured while working for the American Rolling Mill Company, Houston, Texas, and died as the result of said injuries, and that his employer was covered because of said injury by workmen's compensation insurance issued and carried by the American General Insurance Company, and that the surviving widow of Jesee Rimbow Sr., deceased, was entitled to $9.41 per week for 360 weeks, compensation insurance from the American General Insurance Company. That Jesse Rimbow Sr. had only two children, Jesse Rimbow Jr. and Bessie Mae Rimbow, minors, who were entitled each to a one-fourth of said compensation insurance. (R. 12-13.)

That at the time of the death of the said Jesse Rimbow Sr., deceased, he was covered with a policy of life insurance in the amount of $1000.00 issued by the Equitable Life Assurance Society in which she was the named beneficiary. (R. 12.)

That at the death of Jesse Rimbow Sr. deceased, he was covered with two policies of life insurance issued by the Universal Life & Accident Insurance Company, one for $292.00, and the other for $240.00, and in which she was the named beneficiary. (R. 13.)

Petitioners on page 8, erroneously state that said policies were payable to the estate of Jesse Rimbow

Sr., deceased. See answer of Huckaby Funeral Home, page 46 of the record where the funeral home alleged that these policies are payable to Rose Esther Rimbow, as the designated beneficiary.

Jesse Rimbow Sr., deceased, died intestate, and no administration was had on his estate, and none was necessary, and that his estate owed but one debt, viz: the funeral bill to the Huckaby Funeral Home for burying his body. That amount of the claim, to-wit: $875.00 by said funeral home was exhorbitant and that the reasonable value of said funeral services did not exceed $250.00. (R. 13-14.)

That she was entitled to judgment setting aside and holding for naught the judgment rendered by the court dissolving the bonds of matrimony between her and Jesse Rimbow, Sr., deceased, and to be adjudged the surviving widow of the said Jesse Rimbow, Sr., deceased, and to grant her a new trial, and to judgment for a homestead interest for life in the home of herself and Jesse Rimbow, Sr., deceased, to judgment against the cross defendant American General Insurance Company, for compensation insurance at the rate of $9.41 per week for 360 weeks; to judgment against the cross defendant Universal Life Insurance Company in the sum of $531.80; and to judgment against the cross defendant, the Equitable Life Assurance Society of the United States, in the sum of $1000.00; and for all of which she prayed judgment. Her motion was sworn to by her. (R. 14.)

Zeola Martin Rimbow, petitioner, whom Jesse Rimbow Sr. married after divorcing the respondent, Rose

Esther Rimbow, Bessie Mae Rimbow, minor child of Jesse Rimbow Sr., by his first marriage, and Jesse Rimbow Jr., minor child of Jesse Rimbow Sr., and Rose Esther Rimbow, his only possible legal heirs, among others, were made the adverse parties defendants in said second amended motion for a new trial. (R. 3.)

The following are the material parts of the judgment of the trial court: (R. 58) "and all of said parties announced ready for trial and no jury having been demanded, said motion for a new trial and also the petition and cause of Jesse Rimbow Sr., deceased, to dissolve the bonds of matrimony between him and this defendant and cross plaintiff, Rose Esther Rimbow, were submitted to the court for adjudication upon the matters of fact as well as of law, and the court having heard the pleadings, evidence and argument of counsel, finds the material allegations in defendant and cross plaintiff, Rose Esther Rimbow's second amended motion for a new trial, true, and finds for defendant and cross plaintiff Rose Esther Rimbow, on both of said causes, and grants said motion for a new trial and now sets aside and holds for naught the judgment of this court heretofore rendered herein of date March 30th, 1944, dissolving the bonds of matrimony between Jesse Rimbow Sr., deceased, and the defendant and cross plaintiff, Rose Esther Rimbow. And it is further considered by this court and so ORDERED, ADJUDGED and DECREED by the court that the said Jesse Rimbow Sr., deceased's petition and cause to dissolve the bonds of matrimony between him and the defendant

and cross plaintiff, Rose Esther Rimbow, be and the same is here now forever denied, and the defendant and cross plaintiff, Rose Esther Rimbow, as to said suit for divorce against her by Jesse Rimbow Sr., deceased, go hence without day; and it is further considered by this court and so ORDERED, ADJUDGED and DECREED by the court that the defendant and cross plaintiff, Rose Esther Rimbow, be and is hereby adjudged to be the surviving widow of the said Jesse Rimbow Sr., deceased, and that the cross defendant, Zeola Martin Rimbow, is not the surviving widow of Jesse Rimbow Sr., deceased." (R. 59-60.)

Judgment against the Universal Life Insurance Company for the clear balance of $481.80 (R. 60), and against the Equitable Life Insurance Company for a clear amount of $935.00 life insurance (R. 61), and against the American Rolling Mill Company for $260.54 (R. 63), and against the American General Insurance Company for $5637.58, compensation insurance (R. 63).

The court thereupon ordered paid out of said judgment the attorneys' fees and the funeral bill of $475.00 and awarded to Rose Esther Rimbow one-half and to each Bessie Mae Rimbow and Jesse Rimbow Jr., a one-fourth of the balance in the registry of the court. Rose Esther Rimbow was awarded a homestead interest for life in the home of Jesse Rimbow Sr., and Rose Esther Rimbow. (R. 64-66).

ARGUMENT.

Respondents' Reply to Petitioners' Specification of Error.

Petitioners' specification of error is that the court, in annulling the divorce judgment by Jesse Rimbow Sr., deceased, against respondent, Rose Esther Rimbow, was without the proper party plaintiff and the subject matter therein, Jesse Rimbow Sr., he then being dead, therefore without jurisdiction to annul the divorce judgment; and that Rule 329 of the Texas Rules of Civil Procedure (the procedural statute pursued by Rose Esther Rimbow in anulling the divorce judgment) as applied by the court, was in violation of due process and the equal protection of the law, under Section 1 of the 14th Amendment to the Federal Constitution.

Petitioners in their appeal to the state courts did not assail and do not now assail the sufficiency of the evidence to sustain the allegations of respondent, Rose Esther Rimbow's second amended motion for a new trial and the judgment of the court; and petitioners predicated their appeal in the state courts and predicate their petition here on the sole ground that the trial court in the proceeding annulling the divorce judgment, did not have jurisdiction of the party plaintiff and of the subject matter in the divorce case,—the plaintiff in the divorce case, Jesse Rimbow Sr., having died before Rose Esther Rimbow, the defendant in the divorce case, and respondent herein, filed her proceeding to set aside the judgment of divorce. Jurisdiction is determined not by the evidence, but solely

by the pleadings, the averments in Rose Esther Rimbow's second amended motion for a new trial. *Spann Bros. Auto Supply Co. v. Miles,* 135 S.W.2d 1016; *Clontz v. Johnson,* 294 S.W., 844.

Her original motion for a new trial was filed on May 5th, 1944 (R. 81); and her second amended motion for a new trial was filed on January 20th, 1945. (R. 3.)

Briefly, appellee, Rose Esther Rimbow, and Jesse Rimbow Sr., had been husband and wife for ten years at the time suit was filed for divorce by him against her. They had accumulated a home located at 4309 Lillie Street, Houston, Texas, in which they were living for years continuously up to the time that Rimbow sent her to Los Angeles, California, to be with her sister, Gladys Mason, for a month or two to regain her health, and in a way to compensate for his cruelty in ruthlessly knocking her to the floor with a chair on Christmas Day in 1943. That she was a faithful wife and he had no grounds for divorce against her. That he wrote her several letters over the period from December 28th, 1943, when she was sent to California until the 28th of January, 1944, when he wrote her that he would send her the money on which to return when he collected his back pay; she continued to write him after February 9th, 1944, when suit for divorce was filed against her. Their letters to each other were affectionate in nature. That he purposely had her cited by publication to prevent her from knowing of the divorce suit against her and falsely made an affi-

davit as a basis for the constructive process "that her residence was unknown to him" as is afforded by Rule 109 Vernon's Texas Rules of Civil Procedure, as a basis for citation by publication. That he procured the divorce on a totally false statement of facts, and on the 9th of February, 1944, when he filed said suit for divorce, he was living in adultery with the petitioner herein, Zeola Martin Rimbow, in the home owned by him and Rose Esther Rimbow, and which they shortly prior thereto occupied as husband and wife.

On the date that he falsely made the purported affidavit that he did not know her residence as a basis for the constructive service, she was a sick woman, wounded in mind and body at his hand, and in Los Angeles at his will and under his control, for he was then the husband at the head of their household, in the possession of their home and their money on which she should return. She was at the time of the false affidavit and filing of the divorce suit, neither absent from the state, nor a non resident of it, but a resident of Houston, Texas, and her residence was then well known to plaintiff, Jesse Rimbow Sr.

> "*Newcomb v. Newcomb*, 13 Bush 544, 26 Am. Rep., 222, 57 L. R. A., page 598, was an action in equity instituted by an incompetent by her next friend, claiming as widow of a deceased person a right to dower in his realty and her distributable share of his personalty, a decree of divorce obtained by the husband prior to his death, which was set up in bar of the present action, was attacked as void upon the ground, among others,

that it was obtained upon constructive service of process, and that, the husband having placed his wife in an asylum in another state, and she being under his control and subject to his will, she was neither a non-resident nor absent from the state in the sense of the statute authorizing constructive service of process. The court held that a decree of divorce thus obtained was void, and subject to collateral attack when pleaded as a defense in an action to recover dower and distribution in the husband's estate, and this notwithstanding the husband had married a second time."

Appellee, Rose Esther Rimbow's action was in the nature of a motion for a new trial as is provided by Rule 329 of Texas Rules of Procedure, formerly Article 2236 of the Texas Revised Civil Statutes, which is in part as follows: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by attorney of his own selection:

"(a) The court may grant a new trial upon petition of the defendant showing good cause, supported by affidavit, filed within two years after such judgment was rendered. The parties adversely interested in such judgment shall be cited as in other cases."

Petitioner herein, Zeola Martin Rimbow, who was married to Jesse Rimbow Sr. at his death, and his two children, Jesse Rimbow Jr. and Bessie Mae Rimbow, his only possible legal heirs, were the parties defendant adversely interested in the motion for new trial.

Proof by Rose Esther Rimbow that Jesse Rimbow Sr., deceased, had no valid ground for divorce against

her, constituted the good cause in the case, and the proceeding was a motion for a new trial. *Smith v. Higginbotham,* 112 S.W.2d 770; see page 773; 141 S.W.2d 752. The divorce judgment would not have become final until two years after it was rendered. *Trugillo v. Piarote et al.,* 53 S.W.2d 466, by the Commission of Appeals. Her attack on the judgment for divorce was not only a direct attack, but in the nature of a motion for a new trial. *Perez et al. v. E. P. Lipscomb & Co.,* 267 S. W. 748, writ of error refused. In the latter case, plaintiffs as a basis for process by publication made a false oath that they did not know the residence of the defendant and the court held that the judgment predicated on such service was absolutely void.

It was the fraud in procuring the divorce by a false affidavit, as a basis for the constructive process, and false testimony, in procuring the divorce, and respondent, Rose Esther Rimbow's suit for the homestead interest in their home and for the life and compensation insurance, that gave the trial court jurisdiction to grant the relief it did in her motion for a new trial. Only as the surviving wife or widow of Jesse Rimbow Sr., deceased, plaintiff in the divorce, could she take a homestead interest for life in their homestead (Art. 3496 Texas Revised Civil Statutes), take one-half of the compensation insurance (Texas Revised Civil Statutes, Art. 8306, Sec. 8a) and collect the life insurance in which she was the named beneficiary on his life, for otherwise she would have no insurable interest in his life. *Whitselle v. Northwestern Mutual Life Ins. Co.,* 221 S.W., 222. The court found that

she gave one-half of the life insurance to Jesse Rimbow Jr. and Bessie Mae Rimbow, children of Jesse Rimbow Sr., deceased, hence in the judgment there was awarded to Rose Esther Rimbow, respondent herein, one-half, and to the children each a one-fourth of the life and compensation insurance, being the cash proceeds in the registry of the court, after paying funeral bill and attorneys' fees. Had she in the motion simply asked to set the divorce aside, without suing for the property rights, her case would fall, because the courts will not busy themselves for sentimental purposes alone to retry a divorce case where the plaintiff has already died, for death has effectually already separated them.

In 1 Corpus Juris., pages 208 and 209, is the following:

> "From the very nature of things a cause of action does not survive the death of a party, where the only relief sought is a dissolution of the marriage relation by divorce, as death effectuates the very end which it is the purpose of the suit to accomplish; and therefore a cause of action for divorce or a pending suit therefor does not survive the death of either party, except in so far as property rights are involved. * * * *
>
> "But where the consequences of the divorce are such as affect the property rights of the parties to the suit, the heirs or personal representatives may have such an interest in the litigation that the cause will survive, not for the purpose of continuing the controversy touching the right of divorce within itself, but for the ascertainment of whether the property has been rightfully diverted from its appropriate channel of devolution. * * * *

"An action may be maintained to set aside a decree of divorce fraudulently obtained, even after the death of the party, obtaining such decree."

In 19 Corpus Juris., pages 169-170, is the following:

"Death of party obtaining divorce. Although the death of one of the parties, whose only object is to sever the matrimonial bonds existing between them, abates the action, for which reason some authorities contend that no decree can be vacated in a direct proceeding after the death of plaintiffs, yet by the weight of authority, for the purpose of establishing property rights, the courts may vacate a decree even after complainant's death, where it was obtained by fraud and imposition on the part of complainant."

In *Cheely v. Cheely,* 110 U. S., 701, 28 Law ed. 298, 4 Sup. Ct. rep. 328, the United States Supreme Court held void a divorce judgment in the tate of Colorado, and decreed the defendant wife in the divorce judgment the surviving widow of the deceased plaintiff therein, and awarded to her one-half of the realty of the estate of the deceased plaintiff as his wife and heir, and as such, under the descent and distribution laws of Colorado, notwithstanding that the plaintiff in the divorce judgment had married again and left by his second wife, two children. The divorce judgment was held void because it was procured by defective service of citation by publication. On page 299, the court stated: "The true question in this case is which of the two Sarah A. Claytons was the lawful wife of James A. Clayton at the time of his death,

and as such, entitled by the statutes of Colorado to inherit one-half of his estate."

In the following cases, divorce judgments were annulled at the instance of the defendant wives, after the deaths of the plaintiff husbands, to entitle the defendant wives to share in the property of their deceased husbands, as their surviving widows and heirs at law, viz: *Hardin v. Hardin,* 1st S.W.2d, 708, Texas Court of Civil Appeals. Defendant wife was not served with process, and did not know of the divorce until 17 years thereafter and after her husband's death: divorce was procured by fraud: *Fox et al. v. Fox,* 179 So., 237, Supreme Court of Alabama, in 1938. Process was by publication on a false affidavit and the divorce procured on false testimony: *Sturm v. Cooper et al.,* 28 Pac.2d 231 by the Supreme Court of Oregon, in 1934. Process was by publication on a false affidavit and the judgment procured on false testimony: *Lawrence v. Nelson,* 113 Iowa, 277, 57 L. R. A., 582. Process was by publication on a false affidavit and the judgment procured on false testimony. Divorce annulled to entitle defendant wife, as his widow, to a government pension on the life of the plaintiff, deceased: *Reel v. Elder,* 62 Pa., 308, 1 Am. Rep. 414. Divorce judgment obtained by publication in a foreign state held void and set aside because of lack of jurisdiction in the court granting it: *Fidelity Insurance Co.'s Appeal,* 93 Pa., 242. Divorce was vacated for fraud in obtaining it 13 years after the decree was entered, without notice to defendant wife, she not knowing thereof until after his death: *Re*

House, 2 Connolly, 524, 14 N. Y. Sup. 275. Divorce obtained in another state, was held void in New York as against the wife who was not personally served; the husband had married again and died, and in a contest between the two wives the defendant wife in the divorce case, was held entitled to be appointed administratrix.

In *Brown v. Grove,* 116 Ind. 84, 18 N. E., 387, divorce judgment was set aside at the instance of the defendant wife, after the death of her husband, 20 years after the decree, because of the fraud of the husband in filing suit against himself in her name, without her knowledge, and procured the divorce judgment on his answer thereto. *Mefford v. Mefford,* 26 S.W.2d, 804, by St. Louis Court of Appeals. Plaintiff was awarded annullment of the divorce theretofore procured by her to entitle her to inherit her husband's property, as his surviving widow and heir, because of promises by the deceased husband in connection with the divorce, to give her certain property which he was prevented from doing by sudden death. *Riley v. Riley,* 25 S.W.2d, 59, by the Appellate Court of Kentucky. Divorce judgment was set aside on appeal after the death of the plaintiff husband, because of fraud in procuring the divorce and to entitle the wife to share in the property of the plaintiff husband, as his surviving widow and heir. *Gato v. Christian,* 92 At., 489, by the Supreme Judicial Court of Maine. Divorce judgment procured by the plaintiff wife, after her death, was annulled at the instance of the defendant husband, because of a mistake of

the court in rendering judgment for divorce. In *Raps v. Raps,* 125 Pac.2d, 826, and *McGuinnes Exr. Etc. of James S. White et al. v. Superior Court of the City and County of San Francisco,* 40 A. L. R., 1110, by the Supreme Court of California, divorce decrees were set aside at the instance of the parties against whom the decrees were rendered, for fraud upon the courts, after the deaths of the parties procuring the divorce judgments. *Rose v. Rose,* 145 S.W.2d, 773, Supreme Court of Tennessee. Petition to annul divorce at the instance of the defendant wife against the deceased husband plaintiff, was denied because there was no property of the deceased husband plaintiff, in Tennessee, but the court on page 774, 3rd paragraph, stated, "we think the weight of authority is that a decree of divorce may be set aside for want of jurisdiction or fraud even though the parties so obtaining such decree be dead, if property rights are involved"; citing numerous cases. *Beavers vs. Bess,* 58 Ind. App., 287, 108 N.E., 266, held proceedings annulling the divorce after the plaintiff husband's death, without property rights being adjudicated therein, was void, but that if in the annullment proceedings, property rights had been adjudicated, the annullment proceedings would have been valid, citing cases.

The courts of the states are unanimous, in the absence of statutory qualifications, with the possible exception of *Nolan v. Dwyer,* 1 L. R. A., N.S., 551, from the State of Washington, that a decree of divorce will be vacated for lack of jurisdiction or fraud at the instance of the defendant when the annullment

proceedings are brought promptly, and where the sole purpose of annullment proceeding is to determine property rights for the defendant in the divorce proceeding. In *Nolan v. Dwyer,* the court refused to vacate the judgment for divorce, stating that it had no jurisdiction of the party plaintiff, who had died. In that case, there was no suit for property rights. On page 554, 1 L. R. A., N.S., in the opinion, is the following: "so far as the property rights are concerned, if there are any, if the judgment is void, such rights are in no way affected by it and all the avenues are open for the determination of such rights where the parties affected, can all be heard." It appears that the court was unwilling to vacate the judgment of divorce, but that if the judgment was void, to determine the property rights accordingly, where the parties affected could all be heard. Determination of property rights is the sole purpose in the fact case, as in practically all other cases where divorce judgments were annulled, after the death of a party thereto. In the fact case, death had already effectually separated the parties. Setting aside the divorce judgment is a matter of form, the means, not the end, to determine the property rights.

The author of 1 L. R. A., N.S., on page 552, states, "Nolan v. Dwyer stands almost alone, since the authorities, as shown by the note in 57 L. R. A. 583, where the subject is treated at length, are practically unanimous that, in the absence of statutory qualifications, a decree of divorce may be vacated for lack of jurisdiction or for fraud, notwithstanding the death

of one of the parties thereto, where property rights are involved." * * * Cases are cited.

In *Israel v. Arthur,* 6 Colo., 85, and 7 Colo., 12, 1 Pac., 442, it was contended that a writ of error would not lie in an appeal for the wife from a divorce judgment after the death of her husband, on the ground that after the husband's death, there was no one who could represent him in this relation, because the bonds of matrimony had been dissolved by death. The court said if a decree of divorce affected the marriage relation only, there would be force in the argument; but when it was considered that a decree in this case, as in other cases, affects the property rights of the parties as well as their marital rights, it would seem that the same reasons exist for determining its validity as in civil cases generally. The decree of the divorce was reversed.

The plaintiff in divorce, having died, all of his possible legal heirs were substituted as parties in his stead, just as is done in any ordinary lawsuit, where plaintiff or defendant dies in the course of litigation. *O'Neill v. Brown,* 61 Texas, 34, was a proceeding under Rule 329. Upon the plaintiff's death, his administratrix was the substituted party for the deceased plaintiff therein. The court was not without jurisdiction for lack of parties in the annullment proceedings, as is contended for by petitioner herein.

On page 38 of their petition, petitioners state, "The trial court granted the motion as prayed for * * * * and refused to recognize the liens of the petitioners

A. L. Huckaby and Selina J. Thomas, doing business under the firm name of Huckaby Funeral Service on the insurance policies, and arbitrarily awarded them $475.00 for burial expenses in lieu of their contract rights to $875.00." Respondent, Rose Esther Rimbow, plead that the funeral bill of the Huckaby Funeral Home for burying the body of her deceased husband, Jesse Rimbow Sr., deceased, for $875.00 was exhorbitant, and that the reasonable value of the funeral services did not exceed $250.00. (R. 13-14.) A. L. Huckaby, the funeral director (R. 126-136), of the Statement of Facts, refused to tell what the casket was made of, what it cost, where he bought it, and what the reasonable cost of embalming the body was. The workmen's compensation insurance was the sole property of the beneficiaries, Art. 8306, Sec. 8a and Sec. 9, R. C. S. The life insurance was no part of Jesse Rimbow Sr.'s estate. The $260.54 due by the American Rolling Mill Company was the only property of the estate that could be used to pay the funeral bill together with $250.00 out of the compensation insurance.

In *Goethe v. McCollum,* 94 S.W.2d, 781, held that where a funeral bill was made by a member of a family, it must first be reasonable and then in proportion to the estate of the deceased whose body is being buried. It was a question of fact as to whether the funeral bill was unreasonable and out of proportion to the estate left by the deceased, and the court did not arbitrarily award the $475.00 for burial expenses.

Respondents submit that the contentions advanced

in the petition for certiorari are fanciful, frivolous, and without merit, and have already been substantially and thoroughly settled by this Court. Wherefore the respondents respectfully pray the court that the petition for certiorari be denied.

Respectfully submitted,

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